(2)

No. 90-780

In The

Supreme Court of the United States

October Term, 1990

EDWARD DeSANTIS and RISK DETERRENCE, INC.,

Petitioners,

v.

WACKENHUT CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Texas

BRIEF IN OPPOSITION FOR RESPONDENT

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STATEMENT OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29.1, Respondent Wackenhut Corporation states that there are no parent companies or subsidiaries aside from wholly-owned subsidiaries.

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SUMMARY OF ARGUMENT

The decision of the Supreme Court of Texas was proper and legally indistinguishable from other decisions. It is in accordance with overwhelming authority holding that noncompetition covenants do not violate the Sherman Act, 15 U.S.C. § 1, either per se or under a rule of reason analysis. The Texas Supreme Court's decision does not conflict with the decision of any other state court of last resort or of any United States court of appeals. There are no special and important reasons justifying the grant of a writ of certiorari in this case.

ARGUMENT

The Sherman Antitrust Act

Section 1 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, *et seq.*, provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . . " Since noncompetition agreements are considered restraints of trade, they are proper subjects for scrutiny under the Sherman Act. *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035, 98 S.Ct. 769 (1978).

Read literally, the terms of § 1 would prohibit all private contractual arrangements. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688-89, 98 S.Ct. 1355, 1363 (1978). However, under elementary principles

of antitrust law § 1 is understood to prohibit only unreasonable restraints of trade. *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244 (1918).

Petitioners' Argument

Petitioners seek writ of certiorari under an argument that noncompetition agreements should be found violations per se of § 1 of the Sherman Act, or alternatively under a rule of reason analysis. If the violations are not per se, Petitioners further argue that noncompetition covenants should be found unreasonable without any proof of adverse effect on competition in the relevant market. Rather, they assert, a showing of detrimental effect on the parties to the agreement should be sufficient.

They claim as legally distinguishable from this case all authority concerning agreements held reasonable and enforceable under common law and valid under antitrust law. Unlike those cases, the Texas court found the agreement in the present case unreasonable under common law but reasonable under antitrust law. Petitioners therefore set forth the distinction as a question of law worthy of review.

Per Se Violations and Rule of Reason Analysis

Examination of alleged antitrust violations is two-pronged. Whether a given restraint is to be classified as a per se violation is the first consideration. Only those activities and contractual restraints deemed inherently pernicious, anticompetitive, and entirely lacking in

redeeming virtue are presumptively illegal and unreasonable per se. Courts thus invoke the per se rule when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 8-9, 19-20, 99 S.Ct. 1551, 1556, 1562 (1979).

Per se violations are stringently limited to such anticompetitive practices as tying arrangements, horizontal price fixing, group boycotts, and horizontal market division agreements, all of which have a significant adverse trade impact. *See, e.g., National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S.Ct. 2948 (1984); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549 (1977); *Consultants & Designers, Inc. v. Butler Serv. Group, Inc.*, 720 F.2d 1553 (11th Cir. 1983); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980); *Bradford v. New York Times Co.*, 501 F.2d 51 (2d Cir. 1974).

Accordingly, from the seminal case of *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211, 20 S.Ct. 96 (1899), to the present, no court has ever held a noncompetition covenant to violate per se any federal or state antitrust act. The law is established: noncompetition agreements are not per se violations. The Texas court's decision merely followed overwhelming precedent in so holding.

If an agreement is to be a violation of antitrust law, a "rule of reason" analysis, the second consideration in

antitrust inquiry, must be utilized. Antitrust reasonableness turns on an examination of the totality of the circumstances, demanding a case-by-case determination. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 689-90, 98 S.Ct. at 1363-64. The trier of fact must determine whether, under all the circumstances of the case, the restrictive practice imposes an unreasonable restraint on competition. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 108 S.Ct. 1515, 1519 (1988); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343-44, 102 S.Ct. 2466, 2472 (1982). Antitrust unreasonableness therefore focuses on the agreement's adverse impact on competitive conditions in the relevant market. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 688-92, 98 S.Ct. at 1363-65; *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 268 (7th Cir. 1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277 (1982).

Separate Analyses: Common Law and Antitrust

Under Petitioners' thesis, common law reasonableness must translate into antitrust reasonableness because most case law finds covenants reasonable under both the common law and the Sherman Act. They claim the converse should be true: common law unreasonableness, as the Texas court found in this case, must lead to antitrust unreasonableness, either per se or under the rule of reason. They seek review on the issue.

Common law reasonableness and antitrust reasonableness may be related due to the rule of reason's

common law origins. However, the analyses are not identical, but involve two separate and distinct determinations. *See National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 689, 98 S.Ct. at 1363. Common law focuses upon reasonableness as to the parties to the noncompetition agreement. The rule of reason looks not to the interests of the parties but to the interests of the public at large, by focusing on significant adverse market effect of the agreement. *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 901-02 (9th Cir. 1983).

Relevant Market Analysis

Conceding in their Petition for Writ of Certiorari that noncompetition agreements may not violate per se § 1 of the Sherman Act, Petitioners would have the Court grant certiorari to determine whether the rule of reason requires proof of a relevant market analysis in addition to proof of "actual detrimental effect" on the parties. Again, Petitioners do not present a question of law on this issue justifying certiorari. The rule of reason demands relevant market analysis to establish more than a small impact on commerce by any individual agreement. *See Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d at 1082.

The weight of overwhelming authority requires some type of market analysis, since identifying the relevant market and isolating the effect of a challenged restraint on that market are dominant considerations in determining whether a restraint is reasonable. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 688-92, 98 S.Ct. at 1363-65; *Lektro-Vend Corp. v. Vendo Co.*, 500 F. Supp. 332, 352 (N.D. Ill. 1980), *aff'd*, 660 F.2d 255 (7th Cir.

1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277 (1982). Without market analysis a covenant's competitive impact cannot be assessed. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 326-28, 81 S.Ct. 623, 627-28 (1961); *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d at 1082-83; *Lektro-Vend Corp. v. Vendo Co.*, 500 F. Supp. at 349-52.

The Texas Supreme Court held that Petitioners did not meet their burden of establishing significant anticompetitive market effect sufficient to prove a violation of antitrust law. Petitioners offered no evidence of an adverse effect on the relevant security services market and requested no jury findings on the issue. (Petitioners' App. 26). The Texas court's decision, in accord with all precedent, presents no question for review.

No Legal Distinction

Finally, Petitioners distinguish all authority from the present case, in which the Texas court found the covenant both unreasonable under common law and reasonable under antitrust law. They conclude that a finding of antitrust reasonableness is somehow contingent upon a finding of common law reasonableness. Since the covenant in the present case was found unreasonable and unenforceable, they request review to determine whether such covenants are also unreasonable under antitrust law. Once again this issue introduces no unsettled question of federal law.

Cases dealing with noncompetition agreements fall generally into the following four categories:

(1) The first and most common group includes cases finding both reasonableness under common law (or state statute) and reasonableness under antitrust law. The majority of cases, including those upon which Petitioners rely, are included in this category.

(2) A second classification deals with those cases in which an agreement is found partially unenforceable under the common law and reasonable under antitrust law. In such cases, courts typically sever the unenforceable portion of the agreement and/or reform the agreement. *See, e.g., Baker's Aid, a Division of M. Raubvogel Co., Inc. v. Hussmann Foodservice Co., et al.*, 730 F. Supp. 1209 (E.D. N.Y. 1990) (geographically overbroad provision of noncompetition agreement severed; remainder of agreement enforced as reasonable under common law and antitrust law).

(3) Other covenants fall within yet a third category. Here, courts hold the agreement at issue unreasonable and unenforceable under common law yet reasonable under antitrust law. No court dealing with such cases finds any significance in the combination of common law unreasonableness and antitrust reasonableness.

The present case is included within the third category, as are a number of other cases. For example, *Amex Distrib. Co., Inc. v. Mascari*, 150 Ariz. 510, 724 P.2d 596 (Ariz. App. 1986) is directly on point. In *Amex Distributing*, the appellate court affirmed the judgment of the lower court, which had held that a temporally overbroad noncompetition covenant was unenforceable but did not violate the Sherman Act. In so doing, the appellate court noted only the distinction between common law and

antitrust analyses. *Id.*, 724 P.2d at 600-01. Validity under the Sherman Act did not merit discussion.

In another opinion, the Fifth Circuit Court of Appeals held a Louisiana noncompete covenant unenforceable because of its lack of territorial limitation. The court also held the same covenant reasonable under § 1 of the Sherman Act, since the evidence presented of relevant adverse market impact was insufficient to show either an illegal restraint of trade or a monopoly. *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488 (5th Cir. 1990). Once more, the Fifth Circuit attached no weight to the combination of unenforceability under Louisiana law and validity under the Sherman Act.

In a case upon which Petitioners rely, the district court had originally held a post-employment covenant unenforceable and at the same time valid under antitrust law. The Eleventh Circuit reversed only the lower court's judgment holding the covenant unenforceable, but affirmed the judgment of no antitrust violation. Again, the appellate court's opinion merely limited its discussion to the reasonableness test set forth in the Restatement (Second) of Contracts § 188. The court made no mention of the combination of unenforceability under Alabama law and reasonableness under antitrust law. *See Consultants & Designers, Inc. v. Butler Serv. Group, Inc.*, 720 F.2d at 1559-61.

> (4) Finally, a certain few covenants fall into a fourth category. Those cases deal with noncompetition agreements, which, although individually reasonable and enforceable under common law, are invalid under antitrust law. In those unusual cases, covenants not to compete have been used as parts of schemes to unlawfully

restrain trade. *See, e.g., Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 68 S.Ct. 947 (1948) (use of monopoly power through execution by corporate theater owner of unlawful series of master agreements between film distributors and chain theater exhibitors); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 65 S.Ct. 254 (1944) (elimination of competition by combination of film exhibitors, through buying businesses and including noncompete agreements as terms of sale); *United States v. American Tobacco Co.*, 221 U.S. 106, 31 S.Ct. 632 (1911) (unlawful series of agreements not to engage as competitors in the tobacco business between corporations and individuals).

Petitioners do not present an unsettled question of federal law upon which review should be granted. Whether a given noncompetition agreement is unreasonable under common law and reasonable under antitrust law is legally irrelevant and indistinguishable from cases finding covenants reasonable under common law and antitrust law.

CONCLUSION

This case involves a contractual dispute between Respondent and Petitioners that should not be elevated without legal authority into an antitrust violation. The law in the area is established and uniform. Petitioners have therefore failed to sustain their Rule 10 burden of establishing special and important reasons justifying the grant of writ of certiorari.

Respectfully submitted,

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